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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1018

MARGARET LOUISE BREITWIESER
and JAMES J. BREITWIESER,

Petitioners,

v.

KMS INDUSTRIES, INC., d/b/a
ADVO SYSTEMS,

Respondent.

RESPONSE OF KMS INDUSTRIES, INC. d/b/a ADVO SYSTEMS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRELIMINARY STATEMENT ADOPTING PORTIONS OF PETITION FOR WRIT OF CERTIORARI

Petitioners, Margaret Louise Breitwieser and James J. Breitwieser, have petitioned this Court for the writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, which had not been reported as of the filing of the petition, but which

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appears as Appendix "A" to the petition. Respondent, KMS Industries, Inc. d/b/a Advo Systems, hereby adopts, and incorporates herein by reference, those portions of the petition designated "Opinions Below" and "Jurisdiction," which appear on page 2 of the petition.

QUESTION PRESENTED FOR REVIEW

Will this Court create by implication, a private, federal cause of action for wrongful death from the provisions of the Fair Labor Standards Act, 29 U.S.C.A. Sec. 212, and certain regulations established by the Secretary of Labor in accordance with the provisions of said Act, where effective state remedies for the conduct proscribed by the Act exist not only in the State of Georgia but generally throughout The United States of America?

STATUTES AND REGULATIONS INVOLVED

Federal Statutes

Fair Labor Standards Act, 29 U.S.C., Section 201 et seq. Section 216, Section 217

Occupational Safety and Health Act, 28 U.S.C., Section 651, et seq. Section 651(11), Section 666, Section 676

Statutes of the State of Georgia

Georgia Code Annotated Section 114-101 (Ga. Laws 1920, p. 167)

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Georgia Code Annotated Section 114-404 (Ga. Laws 1920, pp. 167, 190, as amended)

Georgia Code Annotated Section 114-413 (Ga. Laws 1920, pp. 187, 188, as amended)

Georgia Code Annotated Section 105-1301 (Ga. Laws 1887, pp. 43, 45)

Georgia Code Annotated Section 105-1307 (Ga. Laws 1887, pp. 43, 45; 1952, p. 54).

Pertinent portions of each of the above cited statutes are set out verbatim in Appendix "A" attached hereto.

STATEMENT OF THE CASE

The statement of the case set out in the Petition for writ of certiorari is essentially correct, but requires minor amplification.

The amended complaint amounts to nothing more than an action for wrongful death, as established by Georgia Code Annotated Section 105-1307. Alleged violation by defendant of the Fair Labor Standards Act (29 U.S.C.A. Sections 203(1) and 212 (c)) was originally charged by petitioners merely to show a measurement of the standard of care required of defendant as the employer of petitioner's decedent. When respondent's motion for summary judgment pointed out the bar of the Georgia Workmen's Compensation Act (Georgia Code Annotated Section 114-103) to the cause of action asserted, petitioners amended their complaint in an effort to assert a cause of action based directly upon the Fair Labor Standards Act. The opinions of the Courts below

(Appendices "A" and "B" of the petition) denied the existence of any such cause of action.

In bringing their petition for certiorari, petitioners have expressly waived their previous contention that the Georgia Workmen's Compensation Act did not bar a cause of action for wrongful death under Georgia Law in the instant case. However, the fact that petitioners now seek review only of the holding of the Courts below as to the availability of an implied federal remedy, only serves to increase the importance of a consideration by this Court of the available Georgia remedies. Therefore, both the Georgia Wrongful Death Act and the Georgia Workmen's Compensation Act have been quoted at some length in Appendix "A".

ARGUMENT

I.

WILL THIS COURT CREATE BY IMPLICATION, A PRIVATE, FEDERAL CAUSE OF ACTION FOR WRONGFUL DEATH FROM THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C.A. SEC. 212, AND CERTAIN REGULATIONS ESTABLISHED BY THE SECRETARY OF LABOR IN ACCORDANCE WITH THE PROVISIONS OF SAID ACT, WHERE EFFECTIVE STATE REMEDIES FOR THE CONDUCT PROSCRIBED BY THE ACT, EXIST NOT ONLY IN THE STATE OF GEORGIA, BUT GENERALLY THROUGHOUT THE UNITED STATES OF AMERICA?

Petitioners readily admit that neither the Fair Labor Standards Act (29 U.S.C.A. 216) nor the regulations promulgated thereunder by the Secretary of Labor (29 C.F.R. 422.7) expressly create a cause of action for

money damages resulting from the death of petitioners' decendent. Petitioners contend, however, that this Court should create such a cause of action by implication, and have called this Court's attention to instances where federal courts have created causes of action by implication in the past. Unfortunately, petitioners, as well as the single dissenting Judge of the Court of Appeals, have ignored the relevance of state law.

If the Fair Labor Standards Act were the only legislative expression upon the subject of on the job injuries to employees, petitioners' arguments would be strong indeed. But the simple fact of the matter is that adequate, private remedies for the alleged wrongful conduct proscribed by the Fair Labor Standards Act exist, and have existed for many years, under the laws of the State of Georgia and generally under the laws of all of the other states of The United States of America.

The common thread running through all of this Court's decisions on the implication of private remedies from federal statutes, beginning with *Texas and Pacific Railway v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916), through *Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); and *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed. 423 (1964), is that new, private causes of action will not be implied from federal statutes where state remedies exist.

Petitioners have called the Court's attention to "Note, Implying Civil Remedies From Federal Regulatory Statutes" 77 *Harv. L. Rev.* 285 (1963), which sets out the criteria considered by courts in assessing the need for creation of new, private remedies by implication. The writer of the note, however, points out that there is little

or no reason to imply a federal cause of action where state remedies already exist. Moreover, all states provide extensive systems of trial courts for the implementation of state created remedies, eliminating the need for federal courts as forums for such litigation. In considering whether to imply a federal remedy under such circumstances, the adequacy or inadequacy of a particular state's remedies is not controlling, since the Court's consideration must take into account the application of its decision throughout all of the States.

Georgia law does provide a remedy for the wrong complained of by petitioners in their complaint. This remedy is a claim under the Georgia Workmen's Compensation Act (Georgia Code Annotated Section 114-101 et seq., Ga. Laws 1920, p. 167, as amended). Moreover, similar remedies for on the job injuries and deaths are provided generally by the laws of all of the states, and there is simply no need to imply a federal cause of action.

As in *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970), cert. den. 401 U.S. 1010 (1971), a case similar in principle to the one at bar, this Court should recognize that tort law has historically been left to the states, and should deny the writ of certiorari.

II.

THE CRITERIA FOR DETERMINING WHEN A FEDERAL REMEDY IS IMPLIED HAVE ALREADY BEEN DEFINED.

In Point IV of their argument, petitioners suggest that this Court should grant the writ of certiorari to define the criteria for determining when a remedy should be implied by a federal court under circumstances similar to those in the case at bar. However, such criteria have already been

more than adequately spelled out by this Court. Succinctly stated, private federal remedies will be implied only where necessary to effectuate the Congressional policy underpinning the substantive provisions of the statute, *and* where effective State remedies for the conduct proscribed by the federal statute are not generally available throughout The United States. *Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205, 54 S.Ct., 402, 78 L.Ed. 255 (1934); *Texas and Pacific Railway Company v. Rigsby*, 317 U.S. 173, 36 S.Ct. 482, 60 L.Ed. 874 (1916); See generally "Note, Implying Civil Remedies From Federal Regulatory Statutes", 77 *Harv. L. Rev.* 285 (1963).

Petitioners have suggested that a reason for the decision in the Court below may have been respondent's argument that implication of a federal remedy in the case at bar "would lead to a flood of actions for violations of the Occupational Safety and Health Act, 29 U.S.C.A. Section 651 et seq." (Petition for writ of certiorari, p. 10). Indeed, respondents do contend that implication of a remedy here would convert virtually every on-the-job accident into a federal cause of action, but the problems inherent in the implication would not stop there. It is readily apparent that there would be a duplication of remedies in almost every instance, since, as previously pointed out, all on-the-job accidents would be covered either by state workmen's compensation acts or tort actions. Should an employee be permitted both a claim under his state's workmen's compensation act and a federally implied cause of action against his employer because of some allegedly unsafe condition on the job? What of the generally prevalent provision of state

workmen's compensation acts that the remedy provided thereby is exclusive? How would venue, damages and statute of limitations questions be determined? This is not to suggest that the existence of such problems should, standing alone, defeat the implication of a federal cause of action if necessary to fill a vacuum, but it does highlight the wisdom of first looking to state remedies before implying a federal cause of action where none would otherwise exist.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be denied.

Respectfully submitted,

FERDINAND BUCKLEY
Attorney for Respondent

Of Counsel:

THOMAS B. BRANCH III
ALFRED B. ADAMS III

APPENDIX A

29 U.S.C., Section et seq., Section 216

"(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as

the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

"(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 206 or section 207 of this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim: Provided, That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary of Labor on behalf of an

employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the two-year statute of limitations provided in section 255(a) of this title it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action. . ."

29 U.S.C., Section 201 et seq., Section 217

"The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title. . ."

29 U.S.C. Section 651 et seq.

"The Congress finds that personal injuries and illness arising out of work situations impose a

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substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

"(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . ."

29 U.S.C. Section 651(11)

". . . by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith. . ."

29 U.S.C. Section 666

". . . (e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more six months, or by both; except that if the conviction is for a violation committed after a first conviction of

such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both. . ."

". . . (k) Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office."

29 U.S.C. Section 676

"(1) The Congress hereby finds and declares that

. . .

". . . (B) in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living.

"(2) The purpose of this section is to authorize an effective study and objective evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate prompt, and equitable system of compensation for injury or death arising out of or in the course of employment.

Ga. Code Ann. Section 114-101 (Ga. Laws 1920, p. 167)

" 'Employer' and 'employee' defined. . . . 'Employee shall include every person in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade,

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business, occupation or profession of the employer and, except as hereinafter provided, minors are included even though working in violation of any child labor law or other similar statute: Provided, that nothing herein contained shall be construed as repealing or altering any such law or statute. Any reference to any employee who has been injured shall, when the employee is dead, include also his legal representatives, dependents and other person to whom compensation may be payable, pursuant to the provisions of this law. . ."

Ga. Code Ann. Section 114-103 (Ga. Laws 1920, p. 167)

"The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this Title, agreeing respectively to accept and pay compensation on account of personal injury or death by accident, shall include all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death."

Ga. Code Ann. Section 114-104 (Ga. Laws 1920, p. 177)

"Nothing in this Title shall be construed to relieve any employer or employee from any penalty for failure or neglect to perform any statutory duty."

Ga. Code Ann. Section 114-107 (Ga. Laws 1920, p. 177, as amended)

"This Title shall not apply to common carriers, the motive power of which is steam and which are engaged in intrastate trade or commerce, nor shall this Title be construed to lessen the liability of such common carriers or take away or diminish any right that any employee, or in case of his death, the personal representative of such employee, of such

common carrier, may have under the laws of this State; nor to employees whose employment is not in the usual course of trade, business, occupation or profession of the employer or not incidental thereto; nor to farm laborers or domestic servants; not to employees of institutions maintained and operated as public charities; nor to employers of such employees; nor to any persons, firm, or private corporation, including any public service corporation, that has regularly in service less than 10 employees in the same business within this State, unless such employees and their employers voluntarily elect to be bound."

Ga. Code Ann. Section 114-404 (Ga. Laws 1920, p. 167, 190, as amended)

"When the incapacity to work resulting from an injury is total, the employer shall pay or cause to be paid, as hereinafter provided for, to the employee during such total incapacity a weekly compensation equal to 60 per cent of his average wages, but not more than $50 per week nor less than $15 per week, except when the weekly wage is below $15, then the regular wages on the date of the accident shall be the weekly amount paid, and in no case shall the period covered by such compensation be greater than 400 weeks, nor shall the total amount of compensation exceed $18,000."

Ga. Code Ann. Section 114-413 (Ga. Laws 1920, p. 187, 188, as amended)

"When an employee is entitled to compensation under this Title for an injury received, and death ensues from any cause not resulting from the injury for which he was entitled the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

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"If death results instantly from an accident arising out of and in the course of employment, or if during the period of disability causes by an accident death results proximately therefrom, the compensation under this Title shall be as follows:

'(a) The employer shall, in addition to any other compensation, pay the reasonable expenses of the employee's last sickness, and burial expenses not to exceed $750. If the employee leaves no dependents, this shall be the only compensation.

'(b) The employer shall pay the dependents of the deceased employee, wholly dependent on his earnings for support at the time of the injury, a weekly compensation equal to 85 per cent, of the compensation which is provided for in section 114-404 for total disability [*Note by Counsel for Respondents: This would typically amount to a total amount of compensation of about $16,000*], for a period not exceeding 400 weeks from date of injury. . . .' "

Ga. Code Ann. Section 105-1301 (Ga. Laws 1887, pp. 43, 45)

"The word 'homicide' as used in this Chapter shall include all cases where the death of a human being results from a crime or from criminal or other negligence."

Ga. Code Ann. Section 105-1307 (Ga. Laws 1887, pp. 43, 45; 1952, p. 54)

"A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband, or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother the illegitimacy of the child shall be no bar to a recovery."

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